Supreme Court of the United States

October Term, 1961

No. 598

DRAKE BAKERIES INCORPORATED,

Petitioner,

against

LOCAL 50, AMERICAN BAKERY & CONFECTIONERY WORKERS INTERNATIONAL UNION, AFL-CIO,

Respondent.

BRIEF ON THE MERITS FOR LOCAL 50, RESPONDENT

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No. 598

DRAKE BAKERIES INCORPORATED,

Petitioner,

against

LOCAL 50, AMERICAN BAKERY & CONFECTIONERY WORKERS INTERNATIONAL, AFL-CIO, and LOUIS GENUTH, Secretary-Treasurer, Local 50, American Bakery & Confectionery Workers International, AFL-CIO,

Respondents.

BRIEF ON THE MERITS FOR LOCAL 50, RESPONDENT

Opinions Below, Jurisdiction Etc.

Respondent is content with the presentation of the formal matters at pages 1-3 inclusive of Petitioner's brief. It would appear that the second of the Questions Presented has been abandoned by Petitioner and so it will not be discussed in this brief. The sole and remaining issue is whether Petitioner is required to arbitrate its claim that Respondent violated the no-strike clause in their collective bargaining agreement.

Respondent deems Petitioner's Statement of the Case inadequate and since it insufficiently reflects the record, respectfully submits the following

Statement

a. The Contract and practice under it. Respondent has been for more than fifteen years the collective bargaining agent for petitioner's production employees (R. 10). Their basic written agreement was last recodified in 1954 (R. 6). The agreement incorporates, by labor-management usage, certain past practices not expressly set forth (R. 29) and in one notable instance an arbitrator decreed that an *express* written clause was to be treated as inoperative on the basis of his finding as to such practice (R. 35-36).

The scope of the Arbitration clause is set forth in Article V(a) (R. 6). It extends to

> "all complaints, disputes or grievances arising between them involving questions of interpretation or application of
> any clause or matter covered by this contract or any act or conduct or relation between the parties hereto, directly or indirectly."

The written agreement requires designation of an arbitrator "upon the written request of *either* the Employer or the Union" (Art. VI(a); R. 7) whenever, no "mutually satisfactory adjustment" is reached by conference "within seven (7) days after the submission of the issue in writing" (Art. V(b); R. 7). In such case it is expressly provided "*either* party shall have the right to refer the matter to arbitration" (*id.*). The Arbitrator, once designated, is granted power to proceed and render a binding decision even "should *any party* fail, upon written notice, to appear." (Art. VI(d); R. 7)

The agreement also contains a clause providing that "there shall be no strike, boycott, interruption of work, stoppage, temporary walk-out, or lock-out" but expressly providing for non-liability of Respondent, "its officers, agents or members" if (a) the Union gives notice within twenty-four hours that "it has not authorized" the stoppage and (b) the Union "cooperates with the Company in

getting the employees to return and remain at work." (VII(a) and (b); R. 8; omitted in Petitioner's Brief.)

In August of 1959—in a prior grievance or dispute—Petitioner claimed that Respondent had conducted an "overtime strike" at its plant (R. 26).

Petitioner, complaining of this "strike", requested the designation of an Arbitrator by the N. Y. State Mediation Board (designating agency under the contract, Art. VI(a); R. 7) and asked that such arbitrator grant both "damages" and "injunctive relief" (R. 27). The State Board "as a matter of long-established administrative practice and routine handles arbitrations arising from claims of violation of various 'no-strike' clauses" (R. 28). It designated an arbitrator, describing the issue as "Breach of Contract and damages as a result of an overtime strike" (R. 28). Both parties appeared before the arbitrator, and the union claimed that because of deletion of a contract provision for "compulsory overtime" there was no arbitrable controversy as to the claimed existence of an obligation to work overtime (R. 33). After adjournment of the hearing,[1] the dispute was settled (R. 29, 34).

b. *The current dispute.* Prior to December 16, 1959, according to Respondent, "it had become part of the agreement established by past practice of many years, that the company's employees were not to be required to work" on the "middle of a three-day holiday week-end" (R. 25). Petitioner conceded "the company had not previously scheduled Saturday production" (R. 12).

The differences that led to this lawsuit arose when, on relatively short notice, the Petitioner elected, for the first

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[1] Pending service of a "ten-day" notice, N. Y. C. P. A. § 1458(2) (R. 33-34). *Cf.*, as to vitality of state procedural rules in these matters *Charles Dowd Box* v. *Courtney* (Feb. 19, 1962, No. 33 O. T. 1961).

While denominated a Board of "Mediation" the state agency offers arbitration services as well, the arbitrators being paid by the State, see Book Review (1962), 62 Columbia Law Rev. 392,395, an example that might well be emulated in other jurisdictions.

time in at least fifteen years, to schedule Saturday production in the midst of what would otherwise have been a three-day holiday week-end (R. 15). This created immediate problems as to both December 26 and January 2: Christmas and New Year's Day of the 1959-60 holiday season each fell on a Friday.

Discussions and negotiations ensued (R. 25, 16-17).

As a result of these discussions and negotiations, held within the framework of the grievance procedure, a *modus vivendi* was established for the day after Christmas, the first problem to which the negotiators devoted their energy and attention. 80 out of 191 employees reported for work on *that* Saturday. Petitioner grumbled but did not characterize this as a "strike" (R. 16-17).

Having reserved its right to negotiate a "rate of pay for work done in such circumstances" (R. 25) Respondent submitted in writing, as required by the grievance procedure, and as a prelude to arbitration, its grievance as to the proper rate of pay for work done on December 26. This was not taken to arbitration because the contract required that seven days elapse after the submission in writing and by such time this action had begun (R. 35).

At a further grievance meeting and negotiation on December 28th, efforts to continue the *modus vivendi* and adjust or apply it for the problem of January 2d apparently broke down. Presumably petitioner demanded that more than 80 men come in (R. 17). It apparently withdrew the assurances of "no reprisal" that it had given for December 26th. On January 2nd, 1960, twenty-six out of the one hundred ninety-one production employees reported for work, a number which the Petitioner deemed insufficient for production (R. 18).

There was no evidence of any picketing, or any conduct by Respondent calculated to prevent its members from reporting for work on January 2nd. There was no evidence that the Petitioner requested or that Respondent re-

fused the posting of anti-wildcat notices pursuant to the limitation-of-liability proviso of Article VII(b)(a).

On the first business day succeeding the Saturday in question, this action was commenced—i.e., Monday January 4, 1960 (R. 1). The Company had not, of course, sought to "adjust" its "complaint, dispute or grievance" nor submitted a protest in writing, by demand for settlement, or otherwise. It had not demanded arbitration of its claim for damages, nor had the Union refused or had an opportunity to refuse to arbitrate the dispute.

Production has proceeded normally since January 4, without other interruption.

There were pending between the parties, as a result of the events of December 16-January 2nd, the following arbitrable controversies, of which the Mediation Board was advised, but which were not calendared pending disposition of this action:

1. The alleged strike or stoppage;

2. Violation, by Petitioner, of the contract, by filing this suit;

3. Rate of compensation for December 26;

4. Propriety of reprimands to shop committee;

5. Propriety of withholding holiday pay;

6. Fulfillment of 40-hour guarantee (R. 31).

Only the first of these inextricably interrelated issues is tendered by the pleadings in the action, the balance being subject to arbitration initiated by the Respondent.

Summary of Argument

1. The fundamental question to be determined when a party seeks to arbitrate a controversy is whether the contract relied upon provides for arbitration of the particular dispute. The arbitration clause of the Drake-Local 50

contract is so comprehensive and clear in its wording that it cannot be rationally argued that it was not intended to cover disputes about compliance with the no-strike clause. Moreover, the procedural provisions of the arbitration machinery permit the employer to file a "complaint". Since the no-strike clause is the one the employer would be most likely to make a claim under, this arbitration clause, expressly open to invocation by the employer, was clearly intended to cover such dispute. This very employer has used the arbitration machinery under this very contract with respect to an asserted violation of the no-strike clause. Petitioner has not met the burden of demonstrating non-arbitrability.

2. Petitioner's argument that arbitration provides an inadequate remedy for violation of the no-strike clause is not supported by authority or history. Even if it were, it would not justify a Court's overriding the express agreement of the parties. Arbitration is not only more suitable but may, in a proper case, be a more effective remedy for an interruption of production. Moreover, the arbitration machinery could have been used, if Petitioner had acted in good faith, to secure a declaratory ruling which would have made this dispute unnecessary. The Court should encourage the use of the arbitration machinery for advisory rulings in such circumstances. In any event, Petitioner's tactics, calculated to impose its will on its employees, heedless of whether it is thereby provoking ill will and tension, should not be countenanced.

3. Petitioner's argument that Respondent waived its right to arbitration of the dispute over alleged violation of the no-strike clause is unfounded. It is an argument in a circle, for it assumes as a condition to the Court's jurisdiction that there has been a violation and in this case, there is a dispute as to whether there was a violation. Nothing that the Respondent said or did on this record could be construed as a waiver of its right to submit to

arbitration its contention that the no-strike clause was not violated. Petitioner, moreover, confuses the question of waiver of arbitration of the initial grievance and waiver of arbitration of the later stoppage. There was, in any event, no waiver of the right to arbitrate either such dispute in this matter.

ARGUMENT

I

The Arbitration Clause Should Be Enforced as Written.

The issue of fundamental importance presented by this case is whether an arbitration clause in a collective bargaining agreement is to be enforced as written where its language is plain.[2]

On the face of the Drake contract a rational argument cannot be made that a "complaint" or "dispute" over alleged violation of the No Strike clause was excluded from the arbitration clause.

This very Petitioner, in another, prior, dispute with this Respondent, sought and found a remedy by calling on the New York State Board of Mediation to designate an Arbitrator in the case of an earlier, alleged "overtime" strike (R. 26-28, 33-34). That dispute was settled, by negotiations, after one meeting with the arbitrator (R. 29).

An eminent arbitrator and attorney, writing with the responsibility of attorneys acting as *amici curiae*, said of the Drake clause: "No broader clause than the one con-

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[2] The question presented does not involve the merits of the federal court complaint filed by Petitioner; it involves solely the merits of Respondent's motion to compel arbitration, which resulted in an order by Chief Judge Ryan staying the action pending such arbitration (R. 23, 22).

tained in the collective agreement now before the Court could be written" (Prof. Herman Gray and Judge Edward Maguire, for New York State A.F.L.-C.I.O., as *Amicus Curiae* below, br. p. 3).

The language of the clause warrants the characterization (R. 6-7).

In the first place, even if the word "grievance" is, as some courts have held, a word of limitation, that limitation is here inapplicable: the subject phrase is "all complaints, disputes or grievances."

In the second place, there is evinced an intention that arbitration be employed not only when there is a question of "interpretation or application" of any "clause" of the contract; it extends also to any "matter covered by this contract", whether or not specifically written into any clause.

The parties then went beyond that, to include complaints or disputes that might involve "any act or conduct or relation between the parties hereto."

Finally, as if their intention were not already unmistakeable, they added, probably unnecessarily: "directly or indirectly."

Not only is their intention made plain in the scope clause; it is also quite evident from the procedural clauses that the employer may, and is expected to, grieve, dispute, or complain, when it sees fit, under the arbitration machinery. The "issue involved" is to be submitted in writing "by the party claiming to be aggrieved to the *other* party." If there is no adjustment "*either* party shall have the right to refer the matter to arbitration." The designation of the arbitrator by the State Board is to be made "upon the written request of *either the Employer* or the Union."

The whole thrust and burden of Petitioner's argument is that a no-strike clause is "the only consideration he re-

ceived from the agreement" (Br. 7, 12, 19, 25, 34). If that were so, then presumably, impairment of that consideration is the only "grievance" or "complaint" that is likely to be tendered by the employer. The arbitration clause clearly contemplates the adjustment or arbitration of grievances or complaints which may have been initiated by the Employer, and the designation of an arbitrator "upon the written request of * * * the Employer" (R. 7). What would an Employer want to take to arbitration besides a complaint of violation of the no-strike clause?

The Petitioner nowhere in its brief discusses the actual wording of the arbitration clause here involved, nor does it attempt to explain why such wording was not intended to comprehend just such a dispute between the parties as to (1) what occurred on January 2, 1960, and (2) whose fault it was. With a candor compelled by the language of the clause, Petitioner argues for reversal for various reasons of supposed policy "irrespective of the scope of the arbitration clause" "irrespective of the rationale" and "irrespective of the broadness of the grievance and arbitration provision" (Br. 25). The Court is asked in effect to rewrite the arbitration clause to insert the proviso "except where an employer *claims* that there has been a violation of the no-strike clause."[3] We emphasize the word "claims" because in this case it is denied that there has been such violation (R. 23, 29).

In the entire period between *Colonial Hardwood* (168 F. 2d 33; 1948) and the first (withdrawn) *Drake* de-

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[3] In a brochure entitled "Model Arbitration Clauses to Protect Management Rights" distributed by the Labor Relations and Legal Department of the Chamber of Commerce of the United States (publication No. 560-051) (Sept. 1961) employers are urged to *bargain for* a no-strike clause containing a paragraph:

> "The provisions of this Article shall not be appealable to arbitration either for the purpose of assessing damages or securing specific performance, such matters of law being determinable and enforceable in the Courts."

Needless to say, in this litigation, this Petitioner is seeking to win such a clause without having to bargain for it.

cision below (287 F. 2d 155) no court went so far as to hold that a no-strike dispute was not within the language of such a broad arbitration clause as that contained in the *Drake* contract. In *Colonial Hardwood* itself, progenitor, as it were, of the line of cases of which the withdrawn opinion represented the extreme extension, the court took pains to note: "it would have been possible, of course, for the parties to provide for the arbitration of any dispute which might arise between them; but they did not do this * * * " (168 F. 2d at p. 35).

Subsequent to the grant of certiorari in this case and in No. 430, the Court of Appeals for the Third Circuit decided *Yale and Towne Mfg. Co.* v. *Local 177*, — F. 2d —, 49 LRRM 2652. The contract language there is not as broad as that in ours, but it is and was held to be broad enough ("either party may invoke the grievance procedure in the consideration of any difference * * * "). The majority and the dissent agreed on one proposition: "The arbitrability of a difference depends on the particular provisions of the agreement. It is a matter of contract and what the parties intended" (per Staley, C. J., for the court). "The narrow question which a court may consider in a collective bargaining agreement containing an arbitration provision is whether the parties seeking arbitration are making a claim, which, on its face, is governed by the contract" (per Gamey, C. J., dissenting).

This Court was quite explicit in *Warrior*:

> "An order to arbitrate the particular grievance should not be denied unless it may be said with positive assurance that the arbitration clause is not susceptible to an interpretation that covers the asserted dispute. Doubts should be resolved in favor of coverage."
>
> * * *
>
> "Is the absence of any express provision excluding a particular grievance from arbitration, we think only the most forceful evidence of a purpose to ex-

> clude the claim from arbitration can prevail, particularly where, as here, the exclusion clause is vague and the arbitration clause quite broad." (363 U. S. at 582, 584-5)

In the present *Drake* case, there is no exclusion clause at all. There is nothing in the withdrawn opinion of the Court of Appeals that explains or justifies its conclusion that "a breach of Article VII is not within the scope of Article V". Such conclusion simply cannot be reconciled with the guidelines of the *Steelworkers' cases,* 363 U. S. 564 ff., that had been decided six months before. It is not an unfair appraisal of the withdrawn opinion to suggest that it was the culmination of a line of cases in some Circuits, explicable primarily by "lack of sympathy for policies favoring arbitration over litigation" (Note, 13 Ind. L. J. 473, 477).[4]

II

The objective of industrial peace will not be advanced by accepting Petitioner's theory nor by countenancing its tactics.

In Petitioner's argument that it should be allowed to select a forum other than that agreed upon between the parties "irrespective of the scope of the arbitration clause" its principal theme is that a decision in its favor "will strengthen industrial peace" (Br. 9).

The premises are (a) a dominant Congressional purpose in enacting Section 301 was to stabilize industrial relations *and* (b) "the right of redress before an arbitrator" does not provide any effective deterrent "against * * * violation of a no-strike provision." The conclusion or

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[4] The panel that decided *Signal-Stat* v. *Local 475,* 235 F. 2d 298, cert. den. 354 U. S. 911, was different in composition; *cf. Markel* v. *U. E. & M. W. A.,* 202 F. 2d 435.

inference is that "the only effective deterrent against the flouting of the machinery * * * is for a Federal District Court * * * to enforce the no-strike provision."

Even assuming this two-pronged argument were based on firm foundation, it would be hard to see what justification a court would have to override an *express* agreement of the parties that all their differences be adjusted or resolved by arbitration. In fact, however, the second half or prong relied upon is tinsel.

The opinion of a single writer in a law review (who thinks "probably" an arbitrator "is not the proper person" (br. 18) is all that Petitioner offers and that is hardly enough of a showing on which to erect the superstructure of Petitioner's argument.

One cannot quarrel with the Petitioner's lengthy and somewhat repetitive insistence that "the grievance and arbitration machinery is provided by a collective bargaining agreement in order to prevent the settling of grievances through industrial warfare" (br. 8). But one must differ with the most unwarranted assumption that arbitration machinery will not suffice for dealing with a grievance or complaint such as this Petitioner makes about this Respondent.

The assertion that the arbitration machinery is ill-fitted or inadequate for dealing with its "grievance", "dispute" or "complaint" that there was a contractually forbidden stoppage is not justified. There is no warrant in the history of this type of dispute for the slur on arbitration and arbitrators implicit in Petitioner's position. History proves the contrary.

At the very moment when the initial panel of the Court of Appeals below was considering Petitioner's appeal from Chief Judge Ryan's decision, the New York Court of

Appeals was deciding *Matter of Publishers Association (N. Y. Stereotypers)*, 8 N. Y. 2d 414. The grievance machinery there involved provided for a Joint Conference Committee to which "shall be referred for settlement any matter arising from the application of this agreement if such matter cannot be settled by conciliation between the Union and the Publisher involved." It was claimed by the Association that there had been a brief work stoppage at the plant of the New York Times. The union there declined to arbitrate the question of damages, resulting in the proceeding to compel arbitration. The Court of Appeals by Chief Justice Desmond wrote:

> "We know that innumerable arbitrations of damage questions are held pursuant to arbitration agreements which do not directly mention 'damages'. No reason appears for a different result here. * * * The landmark arbitration case of *Matter of Marchant* v. *Mead Morrison Mfg. Co.*, 252 N. Y. 284, 298-9 says that an agreement in a contract that all controversies growing out of it should be arbitrated—or any equivalent agreement—authorized the arbitrator to assess damages."

Here is an example, at its best, of state law "compatible with the purpose of Sect. 301" that "may be resorted to in order to find the rule that will best effectuate the federal policy", *Lincoln Mills*, 353 U. S. 448, 457.

Respondent's moving affidavit asserted, without contradiction, that the New York State Mediation Board "as a matter of long-established administrative practice and routine handles arbitrations arising from claims of violation of various 'no-strike' clauses" (R. 28). A casual glance at one of the popular collections of labor arbitration decisions will show that arbitrators have been repeatedly called upon to grant damages or other remedies, in such situations—and have done so when the facts require it.

E.g.:

Oregonian Publishing Co., 33 L. A. 574;
Hoffman Beverage Co., 18 L. A. 869;

Motor Haulage Co., 6 L. A. 720 (enf'd 272 App. Div. 382;
Paramount Printing & Finishing Co., 13 L. A. 143;
Newark Newsdealer Supply Co., 20 L. A. 476;
Canadian General Electric Co., 18 L. A. 925;
Merchants Frozen Food, 34 L. A. 607.

Petitioner bases its bold statement that if a "Section 301 action for a breach of a no-strike clause may be stayed, pending arbitration, then Section 301 is absolutely meaningless to effect its primary purpose—the deterrence of industrial strife" on the proposition that "an arbitrator cannot effectively impose a severe sanction" (br. 16-17). Ignoring the cases cited above, this key assertion they base on the judgment of one writer,[5] calling his opinion "these realities" (br. 18).

As opposed to Mr. Lowden's view, we can cite an equally careful student, who concluded:

> "The working-out of effective and workable means of enforcing no-strike provisions is necessary to the enforcement of collective bargaining agreements as contemplated under Section 301. To be effective, such enforcement must be consistent with the scheme of industrial government which has been evolved under collective bargaining agreements. This requires that arbitration be accorded the central place in the adjudication of breaches of no-strike provisions, as well as of other provisions of the agreement." *Richard A. Givens*, "Section 301, Arbitration, and the No-Strike Clause" 11 Lab. Law Journ. 1005, 1021.

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[5] Lowden, Labor Arbitration Clauses, 43 Va. L. Rev. 197, Petitioner omits to state that Mr. Lowden's article is a discussion of draftsmanship and that the writer, in portions of the paragraph preceding and following its quotation, states: "It is doubtful if the employer desires the right to institute arbitration * * *. If the employer can arbitrate, he may find that he must exhaust that remedy before some courts will act" (op. cit. at 202-203).

One consideration that applies with great force to the events here involved has been noted by another student of the problem.

> "The arbitrator's decision can do much to relieve the strained feelings and discontent which will be the result of litigation, no matter which side is victorious. The strike provokes bitterness and rancor between employer and employee, both of whom feel themselves wronged. A time consuming, technical and costly court battle can only further this animosity", Note, *Arbitration of No-strike Clause Breaches,* 31 Ind. L. J. 473, 486.[6]

To the effect that in a proper case an arbitrator can deal more vigorously and not merely more understandingly with this type of dispute, see *Matter of Ruppert* v. *Egelhofer,* 3 N. Y. 2d 576, holding that it is not a violation of New York's anti-injunction law for a court to decree enforcement of an award restraining a strike.

Viewed in retrospect, the events with which this case is concerned give eloquent demonstration that all is not black and white in these matters, even when a partial or limited stoppage occurs.

It is as important—if not more important—that a strike or stoppage be not provoked, as it is that it not occur.

It is essential to recognize that in a free society a union does not exist to coerce men to work against their will; that workers are human; that there is an emotional element in a "wildcat" stoppage (from which the union and its paid officials do not stand to gain); that in this very case the Petitioner could have, but did not, make thoughtful

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[6] It is also important to note the observation of this writer that "the creation of a competing forum in the federal courts under Section 301 has threatened to break down the voluntary system" which, if properly adhered to, points "the way to continuity of production, which must be the goal of both parties" Loc. Cit. at p. 475.

If there be any relevant policy argument, it is that "the means chosen by the parties for settlement of their differences" should be "given full play," *United Steelworkers* v. *American Mfg. Co.,* 363 U. S. 564.

and constructive use of the grievance and arbitration machinery which would have taken account of that emotional element, and would have avoided the minor episode of one-day absenteeism that did occur.

Consider the facts: assuming the validity of the Petitioner's economic reasons for wanting to depart from the past practice of not scheduling work during a three-day holiday weekend, there is nothing to indicate that its decision to make the change was a sudden response to an emergency problem. It is a fair inference from the employer's affidavit that it knew long before December 16, that it would like to experiment with the novel idea of production on Saturday following Christmas and New Year's. The days on which these holidays fell on the calendar was known to management all year long.

An arbitrator is fully qualified to render a declaratory ruling, advising the parties (after hearing the facts, examining the contract, and reviewing the past practices) as to just what their rights and obligations may be. There is no reason to be found in this record which will justify the failure of the employer, whose intent and desire to change a past practice of upwards of fifteen years' standing remained its secret until December 16, to attempt to secure the union's agreement sufficiently in advance of the date of the change so as to make it possible to secure a final and binding arbitration award if there had been a disagreement.

This course of procedure would have been an appropriate use of the grievance machinery as the "heart of the system of industrial self-government." As this Court pointed out in *Warrior*:

> "Arbitration is the means of solving the unforeseeable by molding a system of private law for all the problems which may arise and to provide for this solution in a way which will generally accord with the variant needs and desires of the parties. The processing of disputes through the grievance

machinery is actually a vehicle by which meaning and content is given to the collective bargaining agreement * * *. The grievance procedure is, in other words, a part of the continuous collective bargaining process."

Petitioner, however, chose to employ a different approach. Its technique was one calculated to avoid a declaratory arbitration. It served its notice, cancelling work on December 24th and requiring work on the 26th, on December 16th. Even if the grievance discussion had been exhausted on the 16th, the Respondent could not have *asked* the appointment of an arbitrator until the 23rd, seven days later, as required by Art. V(b). The calendar of the State Mediation Board, it may be fairly assumed, was such that no hearing could have been had until after December 26, and probably not until after the first of the year, in view of the holiday period—which arbitrators, lawyers and judges celebrate more widely than bakers.

Petitioner, in other words, deliberately sought to make the negotiations over the change of practice a game of maneuver, a test of will, a gamble that its employees would submit to the change, faced, at their peril, with a charge of "strike" or "insubordination" if they did not submit.

For men who had been accustomed to a privilege and benefit of enjoying a rare three-day week-end, it would have been small solace to have an arbitrator tell them afterwards, if they had submitted, that they had not been required to. Even an award of premium pay would not have made whole those whose emotional investment in the three-day weekend was one that could not be salvaged by a few cents an hour. Neither a lawyer, nor a judge can say that it is foolish or unjustified for a baker to set great store by the prospect of three consecutive days away from the oven, or the packer from the conveyor belt.

It was in this setting, with a rank and file group at an emotional pitch, and under the stress of a deadline, that

Petitioner forced Respondent's officials to negotiate, within a brief period, about a change of a fifteen-year practice. They did remarkably well. They worked out a standby arrangement whereby Drake would not discipline those who did not show up the day after Christmas, if enough employees reported to meet the needs of production. 80 out of 191 showed up—and Petitioner does *not* call it a "strike".

The employees remained unenthusiastic. The standby arrangement did not solve the January 2nd problem. The record does not show to what extent this was due to Petitioner's intransigeance. 26 instead of 80 employees showed up January 2nd—and Petitioner chooses to call it a "strike".

What is evident from all this is that Petitioner did not want to secure and Respondent never had an opportunity to secure an arbitrator's advance ruling as to the propriety of Petitioner's proposed change; Petitioner carefully and deliberately timed its conduct so as to avoid such a ruling and to create the maximum possible tension and disharmony in making its change of schedule. There is no evidence that the Respondent instigated or encouraged the multiple absenteeism alleged; the evidence *is* overwhelming that Petitioner provoked it.

After a glance at these, the actual facts, the arguments of Petitioner about "promoting industrial peace" may be given a second look. To the extent that industrial stability was jeopardized at Drakes in 1959 the fault can be placed only at the door of those who so conducted themselves as to make it impossible for an arbitrator to pass, in advance, on a proposed change of practice that had become imbedded in the relationship of the parties. Without such an advance ruling, the employees had ample justification for believing that a valued benefit was being taken away without contractual justification.

Having by-passed the grievance machinery when it sought to institute the change of practice, Petitioner, crying "strike", seeks to by-pass that machinery once more, and rushes to a forum which it thinks will be more hospitable in its effort to destroy the "practice of the industry and the shop"—the "industrial common law" rule—that its employees believed, in good faith and with good reason, forbade it from scheduling work on Saturdays. It will thus, if permitted, avoid a ruling by the forum agreed upon by the parties, as to its right to make the change. All this is done in the name of industrial peace. Petitioner's purpose is as unfair as its protestations are hypocritical.

The talk of "*quid pro quo*" is meaningless in this situation. The Petitioner so conducted itself as to prevent calm negotiations and a useful adjudication of its claimed right to schedule Saturday production *prior* to the event. It gambled on its ability to impose its will by threat of punishment for insubordination, as against the individual employees, and threat of suit, as against the union. Its summons and complaint were drawn and ready for filing on the first business day after January 2nd. Having embarked on a game of ruthless maneuver, wholly abhorrent to the concept of industrial self-government, it cannot now be heard to say that it has received less than it bargained for. It seeks "Judicial redress" for events that were solely the consequence of its own acts which aborted the grievance and arbitration machinery.[7] That machinery remains, as provided by contract, available to test out its "complaint" about the "conduct" of the Respondent and its members.

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[7] While Respondent insists that it can demonstrate to the satisfaction of an arbitrator that *there was no strike,* we believe that the following analysis is apt:

> "In view of the relationship between the parties and the complex nature which their disputes possess, every issue is relevant in determining responsibility. The purpose of the no-strike clause is continuity of production through union responsibility. It should not be used to allow irresponsible management to saddle strike costs on a union which struck because it had no other alternative." 31 Ind. L. J. at 485.

III

The Stay Cannot Be Denied on the Mere Assertion That There Was a Strike January 2d.

Petitioner's remaining contentions may be summarized in its own language: "the unique importance of a no-strike clause" requires the conclusion that it is "so fundamental a breach of the grievance and arbitration clauses that it should not be allowed to involve these clauses to protect it from judicial sanctions against the very same violation" (Br. 8). It suggests that "whether the legal rationale is denominated waiver, default, estoppel or some other characterization • • • the Union should not be allowed to invoke the very machinery it has violated" (br. 20-21).

The difficulty with and the inherent fallacy in this approach is that it assumes in advance the very finding which the tribunal is asked to make.

On the record in this case, particularly, the reasoning is seen to be specious. The allegation of the complaint that Respondent "authorized, instigated and encouraged" Petitioner's employees to "engage in a strike, a concerted stoppage" (R. 4) is categorically denied in the motion for a stay (25, 29). Is the arbitrator to be ousted of jurisdiction on petitioner's mere assertion that there has been a violation of the no-strike clause?

The parties agreed that *all* complaints or disputes involving questions of interpretation "or any act or conduct or relation between the parties hereto, directly or indirectly" if unresolved by negotiation, were to be determined by a particular forum—the arbitrator. There is no warrant in statute for the result for which petitioner contends, namely, that it need only claim that there was a violation of the clause and that such claim, without more, will enable it to avoid arbitration.

The complexities of industrial relations and the wide variety of factual problems that may arise to tax or test the resources of industrial self-government give ample reason why such a result should not be permitted. A shift in a department may be reluctant to start work for a few minutes if it arrives to find a new machine has been installed. A group on a loading platform may disobey its foreman when, unexpectedly, it finds teamsters participating in the loading. The discontinuance of the practice of permitting a coffee-break may create turmoil for a period of time. There is need "for flexibility in meeting a wide variety of situations" (*Enterprise* at p. 597).[8] The imagination of a mere lawyer, who has never worked in a modern industrial plant, is inadequate to forecast the variety of situations that may result in brief and more or less troublesome stoppages of production. To prevent such stoppages is the task of responsible union leadership and responsible management. They share as well a mutual interest and obligation in terminating them when they occur. The "wildcat" is more of a headache to the Union leader than to the managers of the enterprise, particularly where the underlying causes may well prove to have involved a provocation by the latter.

All this is urged not to condone or justify interruptions of production, or stoppages or refusals to work that are not really "strikes". It is presented to illustrate the inevitable difficulty inherent in petitioner's basic premises: that the *mere assertion* in a complaint (1) that there has been a strike and (2) that it was in violation of a no-strike clause, is enough to warrant subjecting unions to the whole panoply of procedures, pleadings, depositions, motions and ultimate formal trial in the federal court. Nor, correspondingly, is it enough to justify saddling the clogged dockets of the federal courts with such actions.

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[8] *United Steelworkers* v. *Enterprise W. & C. Corp.*, 363 U. S. 573.

The facts in the present case are sufficiently illustrative of the hazardous consequences of accepting petitioner's reasoning. In a conventional sense there was no "strike". "A strike is a cessation of work as a means of enforcing compliance with some demand upon the employer" 40 Words and Phrases 309. Here there was no demand, no picketing, no threats, no ulterior purpose sought to be achieved. There was a mere failure to come to work, for one day, by employees who, with at least a colorable justification for so believing, did not regard themselves as obligated to come to work. They did come to work on the next business day—without benefit of injunction, summons or complaint; they made no demands, directly or indirectly, while they were out (34).

The mere occurrence of a stoppage or interruption of production does not mean, without more, that there has been a violation of the "no-strike" clause by the contracting union. The facts of industrial life are ignored in Petitioner's presentation. As Mr. Richard Givens wrote, in "Section 301, Arbitration and the No-Strike Clause", 11 Lab. Law Journ. 1005, 1011-12:

> "The purpose of no-strike provisions in collective agreements—continuity of work during the contract term—may be frustrated by action of the contracting union, by outside unions, or by the employees themselves apart from any union. The appropriate means of enforcement and the corresponding limitations of responsibility must be considered in each instance."

Reference to the precise wording of the Drake-Local 50 "no-strike" clause is also appropriate. Union liability is quite carefully limited, and the broad language of Article VII(a) must be read in the light of the limitations of Article VII(b) (R. 8). Respondent is immune from damages whenever it gives written notice within twenty-four hours after the beginning of the stoppage that "it has not authorized it" and cooperates with the Company in getting the employees to return. An initial question of law is

presented as to whether, in the face of such clause, there can ever be union liability where the stoppage is, as this one was, of less than twenty-four hours duration. (This is not to concede that there was a "strike" or "stoppage" as contemplated by the contract.) Perhaps the Union could have raised that question by motion for summary judgment—if it had not consistently taken the position that it was in the wrong forum to start with. The record moreover—in the petitioner's own affidavit—shows cooperation by the union in an effort to cope with the morale problem created by Petitioner's brinkmanship in handling this episode.

How can the Respondent be held subject to doctrines of "waiver, default, estoppel" when it was actively on the scene, trying to resolve the dispute by negotiation (R. 16), demanding arbitration when an impasse was reached (R. 25) and prevented by petitioner's own conduct from securing the therapeutic effect of an arbitration hearing before the crucial days in question?

The Court of Appeals for the Third Circuit—in a more realistic opinion than any that have dealt with this type of question—pinpointed the difficulties with Petitioner's position. The Court wrote, in *Yale & Towne*[9]:

> "The union is not under an absolute duty to prevent a strike, and the mere fact that one takes place does not necessarily make it liable to the company * * * it may be necessary to determine whether the company, in light of the record, deliberately provoked the alleged strike. These are questions which, under the circumstances, involve the merits of the controversy, and may best be answered by examining the total employer-employee relationship as manifested through the collective bargaining agreement * * *.
>
> "* * * the question here is not merely to determine whether a strike took place. Resolution of that question may well raise collateral problems involving past practices and recognized responsibil-

[9] F. 2d , 49 LRRM 2652, 2654 (Feb. 14, 1962).

> ities of the parties insofar as a work stoppage is concerned. That, in turn, may require an examination of the bargaining history and grievance settlements, which admittedly we cannot do."

Even were there room for application of doctrines of waiver here, there is an important distinction to be made. Is the claimed waiver one of the right to arbitrate the initial grievance—the rescheduling—or of the right to arbitrate the subsequent complaint—the alleged "strike"? Conceivably the former can be waived, when a union strikes, and admits it has struck, without seeking to arbitrate the underlying grievance. Whether there has been such waiver, however, is necessarily a question for the arbitrator, when the clause is as broad as that here involved.[10]

Waiver of the right to arbitrate the question of alleged violation of the no-strike clause, however, is unthinkable on the facts here involved. No effort was made by Petitioner to negotiate the claim for damages; there was no refusal by Respondent to arbitrate. While the Respondent was still attempting to use the grievance machinery with respect to the underlying controversy, Petitioner rushed into court without advance notice, protest or demand, seeking, in effect, to bring about judicial pre-emption of the entire matter.

The motion to stay by Respondent was an appropriate answer, and in reply to the motion, no facts were furnished on the basis of which a court could say the union had disqualified itself from access to the arbitration tribunal. The ultimate availability of "judicial redress" for Petitioner remained: had it gone to arbitration, and prevailed, it could have moved in the action, theretofore stayed, for

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[10] If, in *Local 174* v. *Lucas Flour Co.* (March 5, 1962; No. 50, O. T. 1961), the union waived arbitration, it may have done so by choice, or by lack of alertness in failing to move for a stay. That case reserves the question here involved (30 L. W. 4170-71):

> "problems [may arise] in specific cases as to whether compulsory and binding arbitration has been agreed upon, and, if so, as to what dispute have been made arbitrable. But no such problems are present in this case."

confirmation of the award. An order confirming an award is, as Judge Learned Hand has pointed out, judicial redress:

> "* * * a stay presupposes that the action shall not abate; and if it does not it must go to judgment of one kind or another. If a defendant wins before the arbitrators, he must be able to clinch his victory by a judgment; on the other hand, having invoked arbitration, he must also abide the result, if he loses."

Murray Oil Products v. *Mitsui & Co.*, 146 Fed. 381, 383.

CONCLUSION

The judgment of the Court of Appeals, *en banc*, should be affirmed.

Respectfully submitted,

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